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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIKE TAITUAVE et al., Defendants and Appellants.	B225435 (Los Angeles County Super. Ct. No. NA081157)

APPEAL from judgments of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed with modifications.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant Mike Taituave.

Law Offices of Allen G. Weinberg and Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant Johnny Filipo.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellants Mike Taituave and Johnny Filipo appeal from judgments entered against them following their convictions by jury for conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1)),[1] five counts of attempted murder (§§ 664, 187, subd. (a)), and five counts of assault with a firearm (§ 245, subd. (a)(2)). The jury found true the gang allegations on all counts (§ 186.22, subd. (b)(1)(C)). The jury also found true various firearm enhancements against Filipo (§§ 12022.5, subd. (a) & 12022.53, subds. (b)-(d)).

Taituave contends that there was insufficient evidence to support his conviction. Taituave and Filipo both contend that prejudicial prosecutorial misconduct requires reversal of the judgment. Both appellants also contend they were improperly sentenced for both the conspiracy to commit murder and the attempted murders which were the substantive offenses that were its object. Both appellants also contend that the trial court failed to award full presentence credit.[2]

We find merit in appellants' contention that the trial court erred by imposing a sentence which violated the rule against multiple punishments. We modify the judgments to reflect that the corrected sentence for conspiracy to commit murder should be stayed pursuant to section 654. Also, we modify both judgments to award 550 days of presentence credit. In all other respects, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

Sometime around 2004 Sheila Ho-Ching became a member of the West Side Piru gang that was affiliated with the Bloods. Beginning in October 2008, Sheila started spending time with her cousin Faasooso Tautolo who was a member of the Sons of Samoa (S.O.S.), a Crips street gang. Faasooso's father Eni Tautolo was the head of the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Filipo raised the improper sentence and presentence credit issues in his brief. We invited supplemental briefing as to the applicability of these issues to Taituave. (Gov. Code, § 68081.)

S.O.S. Sheila lived with her father Hoching Ho-Ching, Jr. (Joe) and her mother Maria Ho-Ching. Other West Side Piru members were known to spend time at the house. Beginning in November 2008, the S.O.S. gang vandalized the Ho-Ching residence. Car windows were broken and a brick was thrown through the front window. Gang-related graffiti claiming S.O.S. territory and identifying Sheila and Faasooso by their street names was written on the house and street including the words "Peanut Killer" and "F P-dime."[3]

On February 16, 2009, a four-door gold Kia drove slowly by the Ho-Ching residence a number of times. Sheila recognized Filipo and another individual named Ross Ian Samana[4] as two of the occupants of the vehicle the first two times it went by the house. Filipo flashed gang signs for S.O.S., called Maria Ho-Ching "a B word" and yelled "F Peanuts" and "I will be back." The third time the car drove by the house only appellant Filipo was in the car. Joe recognized the gang signs that Filipo flashed as being from the S.O.S. gang. He called his son Daniel Ho-Ching who lived nearby, to come over to see if he knew who the people were that were driving by his home.

Daniel, driving a blue GMC Yukon arrived within minutes and his parents and sister told him about the vehicle circling their home. He drove around the neighborhood a few times but did not see it. He returned to his parents' house moments before a car pulled up outside. His parents and sister said, "That's him right there, that's the car right there." Daniel signaled to him indicating he wanted to talk to him. Filipo threw up the S sign, signifying S.O.S. and waved to Daniel to follow him.

Daniel proceeded to follow Filipo as he drove down the street. Filipo sped up at times and then slowed down as they drove through the neighborhood. At times Daniel followed bumper to bumper and at other times he was close to a hundred yards behind.

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[3] Sheila's moniker was "P-dime" and the P referred to Piru. Peanut was a derogatory term used to refer to members of the West Side Piru gang.

[4] Samana is not part of this appeal.

Daniel called 9-1-1 and gave a description of the car and the license to the dispatcher. On one occasion when they were traveling bumper to bumper Daniel could see that Filipo was talking on his cell phone and overheard him say "Let's blast on these niggers, cuz." Daniel panicked a little and looked around to see if anyone was behind him.

Meanwhile, Maria called Daniel a number of times and when he did not answer the cell phone she became worried. Joe, Maria, Sheila and Faasooso all got in a four-door white Montego car and went to look for Daniel. Joe was driving with Maria in the front passenger seat and Sheila and Faasooso in the back seat. Joe drove around the neighborhood streets as Maria continued to call Daniel's cell phone.

As Joe was driving around looking for Daniel he spotted the Kia driven by Filipo and turned to follow it. When he turned the corner he saw Taituave who was standing between two cars on the left side of the street raise his hands up. Joe told his wife "My God, we are going to get shot." Joe heard the shots and one bullet hit his arm and another hit his chest. He told his wife "I got hit, I got shot." Maria heard several gunshots and one bullet hit the left side of her stomach. Sheila saw Taituave step out from between the cars on the sidewalk. He was wearing a black hoodie. She saw the flash from the muzzle of the gun as he started shooting. Joe told Sheila and Faasooso to get down on the floor and he continued driving until he got back to his home.

Daniel had to slow down because a truck was between him and Filipo and he was now about a block behind Filipo. When he got around the truck he saw Filipo turn. He also saw his parents' car turn down the same street behind Filipo. He sped up because he feared what was going to happen. As he turned onto the street to follow Filipo and his parents he saw appellant Taituave wearing dark clothing "step out from behind the shadows" and fire at least seven or eight shots at his parents' vehicle. Taituave then turned and fired three or four shots at Daniel. Daniel was not hit but two bullets struck his vehicle. He saw a number of people running towards a PT Cruiser before he reversed his vehicle and went back to his parents' house.

Ashley Tofi testified that on the evening of February 16, she and her friend Alicia Tafua went to the store with Taituave and then to Filipo's house in Alicia's PT Cruiser. Alicia was driving. Taituave received a telephone call and Ashley overheard him say "Who's following you? All right. I'll be right there. I am almost there." Alicia pulled the car over to the side of the road when they reached Filipo's house and Taituave got out. Ashley saw Filipo's car drive by followed by a light colored four-door car, and then a third vehicle that looked like a dark colored Tahoe. Ashley remained in the car with Alicia and heard gunshots. As Taituave got back into the car he said "Oh, shit, I dropped my clip," and picked it up. Ashley told the investigating officers that when Taituave said "clip" she knew he was referring to a gun. Alicia, Ashley, and Taituave then drove to a bar in Orange County where they met up with Filipo.

Later that night, Officer Robert Guerrero, of the Long Beach Police Department,[5] investigated the crime scene outside Filipo's residence. He found a total of 10 nine-millimeter bullet shell casings in the middle of the street.

At approximately 1:15 a.m. the next morning, Officer Michael Hynes stopped a Kia driven by Filipo, a few blocks north of Taituave's residence. Filipo was detained and Officer Hynes conducted a search of the Kia. From the front passenger seat of the car he recovered a cell phone and a nine-millimeter Ruger magazine loaded with 10 bullets. There was an S.O.S. gang inscription on the phone and a search of the phone uncovered a picture of Taituave holding a firearm.

Officer Fernando Martinez questioned Taituave on the night of the shooting as part of the investigation. Taituave was standing inside the gate of his residence talking on a cell phone. He wore a black sweater and jeans and his hair was braided in cornrows. In executing a search warrant for Taituave's residence, Detective Hector Cardiel recovered a green military ammunition box from the garage. The box contained a nine-millimeter high-capacity magazine for a pistol, a box of 45 automatic ammunition, another box containing 357 Magnum rounds, and a bag containing assorted rounds of

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[5] All police personnel were from the Long Beach Police Department.

rifle and nine-millimeter Luger ammunition. The box also contained cleaning patches, Q-Tips, a toothbrush, a tool used to remove the front cap of a handgun, and a homemade tool with a screw on the end of it, all of which Detective Cardiel explained were used to clean handguns and rifles. Detective Cardiel also recovered a nine-millimeter gun with a fully loaded magazine that was wrapped in a T-shirt and hidden among a container of folded clothes.

Joe was hospitalized for three days and a bullet was removed from his right side. He had numerous surgery scars on his arm, shoulder and chest. Maria was hospitalized for six days and had surgery to remove a bullet from the lower part of her left abdomen.

Officer Robert Gonzalez was the investigating officer assigned to the case and spoke with the victims while they were at the hospital receiving treatment for their injuries. He showed them several photographic lineups (six-packs).

Joe identified Taituave as the person who shot him. He circled Taituave's photograph and wrote "That's the guy who shot at me." Joe also identified Taituave as the shooter at trial. He identified Filipo from the photographic lineup and at trial as the driver of the car that circled his home a number of times on February 16, 2009.

Maria identified Taituave from the photographic lineup shown to her by Officer Gonzalez. She circled Taituave's photograph and wrote "He is the one who shot me and my husband." At trial, she identified Taituave as the shooter, and Filipo as the driver of the car.

Daniel identified Taituave from the photographic lineups shown to him by Officer Gonzalez as the shooter. He circled the photograph of Taituave and wrote "Mikey, aka Tweeze, stepped out from behind the parked vehicle, left side of the street, and aimed, looked, and fired numerous rounds at my parents as they drove up and past him. He then turned towards me and fired a few rounds, striking my vehicle." Daniel circled Filipo's photograph and identified him as the driver of the Kia. He also identified Samana's photograph and wrote "Ross was present in the area of the shooting." At trial, Daniel

identified Taituave as the shooter, and later on cross-examination said he was "80 percent" sure it was Taituave.

Sheila "appeared to be really uncomfortable" when looking at the photographic lineup conducted by Officer Gonzalez. She did not identify Taituave as the shooter but indicated that she knew him as "Mikey" and wrote "That's Twizz." She said the shooter wore a black sweatshirt, black pants, and a white T-shirt. At trial, she identified Taituave as the shooter.

Officer Gonzalez testified that all calls to the 9-1-1 dispatch are logged and the calls regarding the shooting were recorded at 9:24 p.m., on February 16, 2009. An examination of the telephone log for Filipo's cell phone showed an outgoing call was placed to Taituave's phone around that time. At 9:32 p.m. an outgoing call was made from Taituave's cell phone to Filipo's cell phone.

Troy Ward, a criminalist with the Long Beach Police Department crime lab, testified as a firearms expert. He opined that the shell casings found at the scene of the shooting to have come from either a Browning, Navy Arms, Ruger, or Tanfoglio firearm, and that the Ruger found at Taituave's residence was not the weapon that fired the shell casings. Tests conducted on the shell casings established that at one time they had been in the Ruger magazine found in Filipo's car.

Officer Jonathan Calvert, the prosecution's gang expert, testified that the West Side Pirus had approximately 30 to 40 documented members in Long Beach and associated with the Bloods gang. The area around the Ho-Ching residence was considered a Pirus enclave and Officer Calvert had previously contacted Blood and other Piru families who lived there. Sheila was an admitted member of the Pirus. S.O.S. was comprised of approximately 200 documented members in the Long Beach area and it was associated with the Crips gang. Officer Calvert testified that appellant Taituave, whose moniker is "Little Twizz" was a documented self-admitted member of S.O.S. He was heavily tattooed with the gang's logo and name and associated with other S.O.S.

members. Filipo, whose gang moniker was "P.K." or "Piru Killer," also had S.O.S. gang tattoos and admitted to Officer Calvert that he was a member of S.O.S.

In response to a hypothetical question based on the facts of the shootings on February 16, 2009, Officer Calvert opined the crimes were committed to benefit the S.O.S. gang. He based his opinion on "the totality of the circumstances" of the crimes as well as "the known documented affiliations of the suspects as well as the victim." Officer Calvert also testified that the dominance of a gang was illustrated by their ability to instill fear in the community. Witnesses were reluctant to come forward and testify, and in some cases even lied on the witness stand to avoid being labeled a snitch. A gang could find out the identity of such a snitch from communication with the defendants or when actual gang members attended the criminal proceedings. Officer Calvert recalled seeing dozens of S.O.S. gang members at the preliminary hearing and at the trial in this case, including Eni Tautolo whom he described as "an influential shot caller figure" in the S.O.S.

Taituave Defense Evidence[6]

Officer Gabriel Garrido interviewed Daniel at approximately 9:30 p.m. on February 16, 2009. Daniel was unable to identify the shooter and he did not tell Officer Garrido that he overheard Filipo talking on his cell phone as he drove through the neighborhood.

Sheila identified Ross Samana as the shooter when shown a six-pack photographic lineup by Detective Tim Olson on February 17, 2009.

Officer Robert Ryan was advised that a possible suspect was in the rear residence at the shooting location. He detained Samana and recovered a black hooded sweatshirt that was found near the entrance to the front residence. In the late night or early morning hours of February 16, and February 17, 2009, when Officer Armando Manzo contacted Samana he was wearing a white T-shirt and gym shorts.

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6 Filipo did not present any evidence on his behalf.

Detective Bobby Anguiano testified that it was important to isolate witnesses to prevent them from talking to other witnesses and being influenced by what they may be told. The witnesses were isolated when he performed the photographic lineups at the hospital.

Procedural Background

An information filed on May 2, 2009, charged appellants in count 1 with conspiracy to commit murder (§ 182, subd. (a)(1)), in counts 2 through 6 with attempted willful, deliberate, premeditated murder (§§ 664, 187, subd. (a)), and in counts 7 through 11 with assault with a firearm (§ 245, subd. (a)(2)). As to counts 1, 2, 3, 7, and 8, the information alleged that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury within the meaning of section 12022.53, subdivisions (d) and (e)(1); as to counts 2 through 6, that a principal personally used and discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (e)(1); and as to counts 7 through 11, that a principal personally used a firearm within the meaning of section 12022.5, subdivision (a). It was also alleged that all counts were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1) (C)).

Appellants pled not guilty and denied the special allegations.

The jury found Filipo guilty on all counts and found all of the special allegations to be true. Taituave was found guilty on all counts and the gang allegation was found to be true. The firearm enhancements were not found true as to Taituave.

The trial court denied Filipo probation and sentenced him to a total of 200 years to life in state prison. The court imposed consecutive 15-years-to-life terms on each of the counts 1[7] through 6, plus additional consecutive 25-years-to-life terms for the great bodily injury enhancements under section 12022.53, subdivision (d) on counts 2 and 3,

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[7] The term of 15 years to life, imposed by the trial court was an improper sentence, as the sentence for conspiracy to commit murder is 25 years to life. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232.)

and consecutive 20-years-to-life terms for the firearm enhancements under section 12022.53, subdivision (c) on counts 4 through 6. Sentencing on counts 7 through 11, and on all other enhancements was stayed pursuant to section 654.

The trial court denied Taituave probation and sentenced him to a total of 90 years to life in state prison. The court imposed consecutive terms of 15 years to life on counts 1 through 6. Sentencing on counts 7 through 11 was stayed pursuant to section 654.

The court ordered appellants to pay restitution and various court fees and each received 479 days of actual custody credits. No conduct credit was awarded. Appellants appealed.

DISCUSSION

I. Sufficiency of Evidence to Support Taituave's Conviction

Taituave contends there was insufficient evidence to prove he was the shooter and that the eyewitness identifications were inherently improbable and cannot be considered reasonable, credible evidence.

The test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. (*People v. Boyer* (2006) 38 Cal.4th 412, 479.) Evidence meeting this standard satisfies constitutional due process and reliability concerns. (*Id.* at p. 480.) When determining whether the trial evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the entire record in the light most favorable to the judgment to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid*.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 480.) When the circumstances surrounding the identification and its weight are explored at length at trial, and the trier of fact believes the eyewitness identification, that determination is binding on a reviewing court. (*People v. Lundy* (1969) 2 Cal.App.3d 939, 944.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

Here, multiple witnesses identified Taituave as the shooter. The record contains in-court eyewitness identifications by Joe, Maria, Sheila and Daniel. All four also identified Taituave as the shooter from photographic lineups shown to them shortly after the incident. During the photographic lineup Daniel included a description of how he saw Taituave step out from behind a parked vehicle to his left and shoot at his parents' vehicle before Taituave "turned towards" him and fired again. At trial he testified that Taituave stepped out from "behind the shadows" and "turned and shot at me." Daniel first encountered Taituave when Daniel was a coach at Long Beach Poly High School and was familiar with him. Daniel regularly saw Taituave lifting weights and at one time acted as a "mentor" to Taituave. The witnesses' identifications of Taituave were neither physically impossible nor inherently incredible.

The cell phone call logs which showed that appellants Taituave and Filipo spoke with each other twice around the time of the shootings were additional evidence that Taituave was the shooter. And even more compelling evidence of Taituave's guilt was the testimony of his friend Ashley Tofi who testified that immediately after the shooting he returned to the car and said that he had dropped his "clip" which she understood to mean a gun.

Taituave contends that inconsistencies in the witnesses' testimony compel reversal. But witness credibility issues are matters for the jury to decide, not this court. (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.)

The facts in this case are in sharp contrast to those discussed in *People v. Carvalho* (1952) 112 Cal.App.2d 482 on which Taituave relies for the proposition that the witnesses' identifications were inherently improbable. In *Carvalho*, the defendant was convicted of kidnapping his estranged wife. She testified that at about 12:30 or 1:00 p.m. while she was driving, defendant who had been hiding in the back of her car climbed into the front seat. (*Id*. at p. 484.) At gunpoint he forced her to go back to her house where they spent approximately one hour during which time they ate a meal she prepared and defendant washed. When the door slammed as they left the house, she asked defendant to climb in through a window and unlock the door so that her son could get in. She then drove defendant to his home. (*Id.* at p. 485.)

Defendant rented a room in a private residence and when they arrived there he placed the gun in a drawer and they talked about reconciliation. Defendant took a bath and afterwards the two engaged in sexual intercourse. They left together at 7:00 p.m. and the wife drove to a service station from where she called her son. They then went to a drive-in to eat. The gun was in the glove compartment and the wife did not try to say anything to other people at the drive-in or to the waitresses. They then drove around for a few hours and parted company at midnight. She made a complaint to the police a month later. (*People v. Carvalho*, *supra*, 112 Cal.App.2d at p. 486.)

Carvalho denied exhibiting a gun and testified that whatever his estranged wife did was done freely and voluntarily. (*People v. Carvalho*, *supra*, 112 Cal.App.2d at p. 488.) A jury convicted Carvalho of kidnapping. On appeal, the court found the evidence insufficient because "the testimony of the prosecutrix [was] fantastic." (*Id.* at p. 489.) Noting the failure to take any of the numerous opportunities to escape or alert someone of her predicament, the court reasoned that "the circumstances testified to by the complainant are more than unusual. They do violence to reason, challenge credulity, and

in the light of human experience, emasculate every known propensity and passion of people under the conditions testified to by the prosecutrix. They are totally at variance with the usual and ordinary conduct of one who is the victim of kidnapping." (*Ibid.*)

We reject Taituave's contention that the present case bears resemblances to *Carvalho*. The eyewitness identifications here were not "fantastic," did not "challenge credulity" and did not do "violence to reason."

Nor do we find merit to Taituave's contention that the jury's finding of not guilty on the gun charges undermines the credibility of the eyewitness identifications. It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) Inconsistent verdicts do not imply that the jury must have been confused. "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict." (*Ibid.*)

II. Alleged Prosecutorial Misconduct

A. Appellants' Arguments

Appellants contend that several instances of prosecutorial misconduct require reversal. Specifically, appellants contend that the prosecutor (1) intentionally elicited inadmissible testimony; (2) posed an improper hypothetical question that incorporated specific details of the case; (3) made statements based on facts not in evidence during closing arguments; and (4) incited the passions, fears, and vulnerabilities of the jury to obtain a guilty verdict.

B. Relevant Authority

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or

reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A defendant's conviction will not be reversed for prosecutorial misconduct that violates state law unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

C. The Prosecutor Did Not Elicit Inadmissible Testimony

Taituave contends the prosecutor committed misconduct when she elicited testimony regarding appellant's booking sheets and prior arrests.

The prosecution's gang expert, Officer Calvert opined that Taituave was a member of the Sons of Samoa gang. He based this on a number of factors including the fact that Taituave was a documented gang member. Officer Calvert reviewed his notes to help refresh his recollection. While doing so, he referred to booking sheets and Taituave's prior arrests. Taituave did not object to any of the statements. Later that day, Officer Calvert stated that he had a "booking sheet" related to Filipo. At sidebar, Filipo requested that his prior arrests be characterized as contacts and noted "This is something that the witness offered." Testimony continued and later that day the trial court denied Taituave's motion for mistrial made on the basis of the earlier "arrest" testimony. Taituave claimed "I had no way of objecting after he had made the statement, after he said arrests."

Taituave raised the issue for the first time during a sidebar to discuss Filipo's objection. Taituave forfeited this particular claim of prosecutorial misconduct because he

did not timely object on this ground in the trial court, which is a prerequisite to preserving such a claim for appellate review. (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

Even if Taituave had not forfeited this claim we would reject it on the merits. A prosecutor engages in misconduct by *intentionally* eliciting inadmissible testimony. (*People v. Valdez* (2004) 32 Cal.4th 73, 125.) The record affords no basis for concluding that the prosecutor did so in this case. The prosecutor used the term "documentation" and "contacts" and it was Officer Calvert that referred to "booking sheets" and "arrests" as was noted by Filipo at sidebar. Furthermore, after Filipo's successful objection the prosecutor informed the trial court and counsel that she would speak with Officer Calvert to inform him of the court's ruling, thus avoiding a recurrence, and the prosecutor did not refer to the improper evidence relating to Taituave's "arrests" in her closing argument. On this record we cannot infer that the unsolicited brief reference to "arrests" by a witness was egregious or reprehensible conduct by the prosecutor that rose to the level of misconduct.

D. No Prejudice Resulted from Improper Hypothetical

Taituave contends that the prosecutor improperly used a hypothetical that was "replete with proper names of the various parties and the specific facts of the case."

The prosecutor posed a hypothetical question asking whether in Officer Calvert's opinion the hypothetical crime was committed for the benefit of a street gang. The prosecutor's hypothetical did use the specific facts of the case and an immediate objection was made by both appellants *before* the question was answered. The court requested a sidebar and informed the prosecutor that she should re-ask the question using the proper format. The trial court then stated in open court before the jury that the hypothetical was in an improper format and sustained the objection. The court then told the jury that it was a hypothetical question and at that point instructed the jury on hypothetical questions. The prosecutor rephrased the hypothetical in the proper format and the witness answered the question.

The propriety of permitting a gang expert to respond to a hypothetical question regarding whether a crime was gang related is well established. "Even if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048, fn. 3.) Taituave's contention is narrowly focused to the use of this particular hypothetical. Officer Calvert did not answer the question following defense counsels' objections. Furthermore the trial court immediately instructed the jury regarding hypothetical questions. We assume the jury followed these instructions. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

Even if we assume error, Taituave fails to demonstrate that he was prejudiced by the prosecutor's conduct. The test for prejudice is the *Watson*[8] question whether there is a reasonable probability of a different result absent the error. (*People v. Adan* (2000) 77 Cal.App.4th 390, 393.) There was overwhelming evidence of Taituave's guilt. Four eyewitnesses testified that he was the shooter and another witness corroborated that he was at the location of the shooting, got into a car immediately after the gunshots, and stated that he had dropped his weapon. We are satisfied appellant suffered no prejudice.

E. Statements Made During Closing and Rebuttal Arguments

1. Contentions

Appellants contend that the prosecutor's statement regarding the presence of gang members in the audience during the trial was not based on facts in evidence. Appellants also contend that the prosecutor's statement that appellants had communicated with the gang members during the trial was similarly not based on facts in evidence. Filipo contends that the prosecutor's rebuttal argument was designed to incite the passions and fears of the jury and to persuade them to convict him so as to send a message to gang members.

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[8] *People v. Watson* (1956) 46 Cal.2d 818.

2. Background

At trial, Officer Calvert was asked if any members of the S.O.S. gang were present in court during the pendency of the trial. He testified that he had "seen several. A couple dozen actually." He testified that some of the same members showed up all the time but their numbers dropped as the trial progressed. He identified a number of individuals by name including one named Brandon Deshawn Arnold who was in the gallery. Officer Calvert testified regarding Arnold's S.O.S. gang membership and conviction for robbery which was one of the predicate acts necessary to prove the gang allegation.

During closing arguments the prosecutor stated, "One of the things that I have to prove to you is that other members of S.O.S. have committed crimes. . . . And we heard about Mr. Arnold, the guy that has been in court with us this whole time . . . ." Later she argued "We also know that the defendants did quite a few activities that might help us understand their gang membership, that they drove by the house shouting insults against Pirus, against their sworn enemies, that they have had contacts with other gang members, including the multiple gang members who have been here in court, including Mr. Arnold, who has been convicted of a crime." No objection was made and appellants made their closing arguments.

During rebuttal, the prosecutor discussed gang intimidation and stated that Joe and Marie testified "despite the fact that this must be unbelievably terrifying. They testified in this courtroom and at the preliminary hearing despite the fact that there are multiple members of [the] S.O.S. sitting in court every single time, including today."

Taituave objected on the grounds that it misstated the testimony and the court immediately admonished the jury stating, "As I indicated before, you will determine facts based on evidence presented; that will be witnesses' testimony and any physical evidence that may be introduced." Taituave moved for mistrial which was denied. The prosecutor concluded her rebuttal, and the jury received its final instructions and retired to begin deliberations. The following morning defense counsel again moved for mistrial based on prosecutorial misconduct in the closing and rebuttal arguments. The trial court denied the

motion. The trial court asked defense counsel why they failed to object during closing argument to which Taituave's counsel responded that they did not want to draw attention to it.

3. Analysis

Appellants' contentions related to the two instances of alleged prosecutorial misconduct during closing argument are forfeited based on trial counsels' failure to object, as noted by the trial judge. Furthermore, the contentions fail on the merits.

First, the prosecutor's argument was factually correct as Officer Calvert testified that gang members were present in court every day during the proceedings; that Arnold was one of the gang members; and that he was in the gallery while Officer Calvert was testifying. The prosecutor's argument was a reasonable interpretation of the evidence presented. (*People v. Willingham* (1969) 271 Cal.App.2d 562, 574.) A prosecutor is given wide latitude in closing argument, and his or her argument may be vigorous as long as it amounts to a fair comment on the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 200.)

Second, appellants' contention that the prosecutor stated that appellants had contact with gang members *during the trial* is not supported by the record. Officer Calvert testified "Oftentimes, the defendants are able to communicate outside of the jail and oftentimes the gallery is filled with sympathizers of that suspected gang or actual gang members themselves." But that evidence was stricken on appellant Taituave's motion. In closing argument the prosecutor stated that the appellants "*have had*" contacts with other gang members including Arnold and others in court. She did not say that those contacts or any communication occurred during the trial. Appellants contend otherwise but are mistaken.

The prosecutor may discuss the facts and law as he or she sees fit, advance any theory fairly within the evidence and urge any conclusions deemed proper. (*People v Hardy* (1969) 271 Cal.App.2d 322, 329–330.) Officer Calvert testified that Filipo and Taituave were members of the S.O.S. and associated with other S.O.S. gang members.

Arnold and others in the gallery were identified as current S.O.S. members. We are satisfied that the prosecutor's comment that appellants "have had" contacts with other members of the same gang was a reasonable inference to be drawn from the evidence.

We reject Filipo's contention that the prosecutor's argument during rebuttal appealed to the passion or prejudice of the jury. In denying the motion for mistrial brought by both appellants during jury deliberations, the trial court articulated an Evidence Code section 352 analysis and stated "Officer Calvert testified precisely that basically when witnesses testify in gang cases, their state of mind is affected because it involves gang cases. And the very fact that these people who have been used as predicate acts are present, illustrate that point. So, I mean, basically you should have told the members to stay out."

The prosecutor used the presence of gang members to support the gang enhancement argument and to explain witness credibility and intimidation. The prosecutor's comments must be "evaluated in the context in which they were made, to ascertain if there was a substantial risk that the jury would consider the remarks to be based on information extraneous to the evidence presented at trial. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 447–448.)

Finally, no harm could have resulted. The trial court instructed the jury that what the attorneys said in closing arguments was not evidence. We presume the jury followed this instruction, which was sufficient to dispel any prejudice created by the prosecutor's argument. (*People v. Waidla* (2000) 22 Cal.4th 690, 725 ["The presumption is that limiting instructions are followed by the jury"]; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].)

We cannot conclude that the prosecutor's argument was an impermissible comment upon the evidence. Whether the inferences the prosecutor suggested were reasonable was for the jury to decide. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 179.)

III. The Trial Court Properly Denied Taituave's Motion for New Trial

Taituave contends the trial court erroneously denied his motion for a new trial sought on the grounds of prosecutorial misconduct. Taituave contends the prosecutor committed prejudicial misconduct when she elicited testimony regarding "booking sheets" and "arrests," posed an improper hypothetical question to the gang expert, and introduced facts not in evidence during closing argument.

The trial court denied Taituave's motion for new trial. The court ruled that the gang enhancement allegation required the prosecutor to prove predicate acts and gang activity, and that Officer Calvert's testimony regarding the presence of gang members in the courtroom was limited to show whether or not it had any impact on the witnesses.

We review a trial court's order denying a motion for a new trial for an abuse of discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. "'"The determination of a motion for a new trial rests so completely within the court's discretion that it's action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*Id.* at p. 524.)

The only argument that Taituave raises with respect to the trial court's denial of his motion for new trial is that in hindsight the prosecutorial misconduct appears even more prejudicial. Our conclusion that the prosecutor did not commit prejudicial misconduct resolves this issue. The trial court did not abuse its discretion in denying Taituave's motion.

IV. The Section 654 Sentencing Issues

The trial court imposed a sentence of 15 years to life on Filipo on his conviction for conspiracy to commit murder (count 1), and consecutive 15-years-to-life terms plus an additional 25 years to life on counts 2 and 3, and consecutive 15-years-to-life terms plus an additional 20 years to life on counts 4 through 6. Filipo contends, and the People

agree, that his sentence for conspiracy must be stayed because section 654 precludes the two separate punishments imposed on his conviction for conspiracy to commit murder and the attempted murders of Joe, Maria, Sheila, and Daniel Ho-Ching, and Faasooso Tautolo.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) A course of criminal conduct is indivisible where all the offenses are incident to a single intent and objective. (*Id*. at p. 1211, see *Neal v. State of California* (1960) 55 Cal.2d 11, 18.)

Filipo was charged with a single conspiracy to commit murder and the court erred by imposing separate punishments for both the attempted murder and the conspiracy to commit murder. The sentences imposed on Filipo for the attempted murders totaled 40 years to life on each of the counts 2 and 3, and 35 years to life on each of the counts 4 through 6. The term of 15 years to life imposed by the trial court on count 1 for conspiracy to commit murder was an improper sentence, as the sentence is 25 years to life. (*People v. Swain* (1996) 12 Cal.4th 593, 608–609.) Because Filipo's convictions for the attempted murders provide the "longest potential term of imprisonment" the sentence of 25 years to life on count 1 for conspiracy to commit murder should be stayed.

Similarly, the sentence imposed on Taituave is also in error. Taituave was also charged with a single conspiracy to commit murder and the court imposed separate punishments for both the conspiracy and the attempted murders of Joe, Maria, Sheila, and Daniel Ho-Ching, and Faasooso Tautolo. Taituave was sentenced to a term of 15 years to life on count 1 for conspiracy to commit murder[9] and consecutive 15-year-to-life terms

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9 As previously noted, this was an improper sentence.

on counts 2 through 6. When Taituave's sentences for the attempted murders are considered in the aggregate they provide the "longest potential term of imprisonment" and the sentence of 25 years to life on count 1 for conspiracy to commit murder should be stayed.

V. The Custody Credit Issue(s)

Filipo

Filipo contends his case should be remanded for a recalculation of his presentence custody credits. He argues the trial court erred in awarding him 479 days of actual credit because he was in custody from February 16, 2009, to sentencing on June 10, 2010, a total of 480 days. Filipo also contends that the trial court erred by not awarding him presentence custody credit for good conduct.

Filipo's first contention fails because the record shows that Officer Michael Hynes testified that he detained Filipo at 1:15 a.m. on February 17, 2009. Therefore, the award of 479 days of actual custody credit is correct.

We agree with Filipo that he should have been awarded good conduct custody credit. Section 2933.1 provides, in pertinent part: "(a) . . . [A]ny person who is convicted of a felony offense listed in . . . Section 667.5 shall accrue no more than 15 percent of worktime credit . . . . [¶] . . . [¶] (c) Notwithstanding Section 4019 [which authorizes presentence conduct credit] or any other provision of law, the maximum credit that may be earned against a period of confinement in . . . a county jail, . . . following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)."

Filipo was convicted of conspiracy to commit murder. The punishment for conspiracy to commit murder "shall be that prescribed for murder in the first degree." (§ 182, subd. (a).) The punishment for first degree murder is "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison

for a term of 25 years to life." (§ 190, subd. (a).) Filipo was also convicted of attempted willful premeditated murder, in violation of sections 664, 187, subdivision (a). Thus, appellant committed offenses that are violent felonies within the meaning of section 667.5, subdivision (c). Section 667.5, subdivision (c)(7) provides that a "'violent felony'" includes "(7) Any felony punishable by death or imprisonment in the state prison for life." Section 667.5, subdivision (c)(12), provides that a "'violent felony'" includes "(12) Attempted murder." Accordingly, Filipo is entitled to the following custody credits: 479 days of actual custody credit and 71 days of conduct credit (479 days X 15 percent = 71.85 days) for a total of 550 days (479 days + 71 days).

Taituave

The trial court's award of presentence custody credits to Taituave is also in error. Taituave was also convicted of conspiracy to commit murder and attempted murder. Taituave was awarded 479 days of actual custody credit. For the reasons discussed in addressing Filipo's presentence credits contention, Taituave is entitled to the following custody credits: 479 days of actual custody credit and 71 days of conduct credit (479 days X 15 percent = 71.85 days) for a total of 550 days (479 days + 71 days).

DISPOSITION

The judgment as to Johnny Filipo is affirmed, except that his sentence is modified pursuant to section 654 to stay execution of the corrected sentence of 25 years to life on count 1, conspiracy to commit murder. In addition, his presentence credit is modified to reflect that he is entitled to 479 days of actual custody credit, plus 71 days of conduct credit, for a total of 550 days of presentence custody credit.

The judgment as to Mike Taituave is affirmed, except that his sentence is modified pursuant to section 654 to stay execution of the corrected sentence of 25 years to life on count 1, conspiracy to commit murder. In addition, his presentence credit is modified to reflect that he is entitled to 479 days of actual custody credit, plus 71 days of conduct credit, for a total of 550 days of presentence custody credit.

The clerk of the superior is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

The judgments are affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ